



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 18 2015

OFFICE OF
GENERAL COUNSEL

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. William A. Shaw, P.E.
Sr. Business Development Manager
HPD Evaporation and Crystallization Water Technology
Veolia Water Solutions & Technologies
1166 Quail Court, Suite 200
Pewaukee, WI 53072

Re: Freedom of Information Act HQ-APP-2013-000391, Final Determination
Concerning Confidentiality

Dear Mr. Shaw:

Veolia Water Solutions & Technologies (Veolia) has asserted a claim of confidentiality for certain information that is responsive to the above-referenced Freedom of Information Act ("FOIA") request to the United States Environmental Protection Agency ("EPA" or "Agency"). This information includes:

- Equipment and installation costs for HPD's evaporation and crystallization technology for flue gas desulfurization (FGD) wastewater treatment.
- Operation and maintenance (O&M) costs of this equipment.

On June 30, 2014, the EPA requested that Veolia substantiate your claim of confidentiality ("request for substantiation"). On July 22, 2014, Veolia submitted its substantiation responses to EPA's request ("substantiation").

I have carefully considered your claim. For the reasons stated below, I find that the information claimed as confidential is entitled to confidential treatment.

DISCUSSION

Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order for information to meet the requirements of Exemption 4, the EPA must find that the information is either (1) a trade secret; or (2) commercial or financial information

obtained from a person and privileged or confidential (commonly referred to as "Confidential Business Information" ("CBI")).

A. Initial Considerations

EPA's regulations at 40 C.F.R. § 2.208 state that, in order for business information to be entitled to confidential treatment, the Agency must have determined that, inter alia:

- (1) The business has asserted a claim of confidentiality and that claim has not expired, been waived, or been withdrawn;
- (2) The business has shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;
- (3) The information is not, and has not been, reasonably obtainable by a third party without the business' consent through legitimate means; and
- (4) No statute specifically requires disclosure of the information.

In your substantiation, Veolia stated that it sought confidential treatment for the above-referenced information indefinitely, that it has taken reasonable measures to protect the information, that no interceding events have negated its CBI claim, and that the information has not become stale. In its analysis of this matter, the EPA has not found any reason to doubt these assertions by Veolia. As a result, I will determine whether or not the information meets the definition of trade secret or CBI.

B. Trade Secret

The definition of "trade secret" under the FOIA is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires that there be a "direct relationship" between the information and the production process. Id. You have neither asserted a claim that the information is a trade secret, nor have you explained how the Agency's release of this information would identify a plan, formula, process, or device. Thus, the Company has not demonstrated how disclosure of the information would identify or reveal a trade secret. Consequently, I find that the information does not constitute a trade secret.

C. Confidential Business Information

If the information does not reveal a trade secret, it may still be exempt from release under Exemption 4 of the FOIA if it is CBI, i.e., "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The terms "commercial" or "financial," for purposes of Exemption 4 of the FOIA, "should be given their ordinary meanings." Public Citizen, 704 F.2d at 1290 (citing Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982)). The information at issue relates to a business, thereby meeting the

ordinary definition of “commercial.” Since Veolia meets the definition of the term “person,” as defined by EPA’s regulations at 40 C.F.R. § 2.201(a), the information was “obtained from a person” as required by Exemption 4 of the FOIA.

In order to qualify as CBI, the information must be “privileged or confidential.” You have claimed this information to be confidential, but you have not claimed this information to be privileged. The Agency has no indication that the information is subject to a common-law privilege and will therefore limit its discussion to the issue of confidentiality. Courts have established two distinct standards to be used in determining whether commercial or financial information submitted to an agency is “confidential” under Exemption 4. The two standards are based on how the information was submitted to the agency—whether the submission was voluntary or required by the agency. Information submitted to the Government on a voluntary basis “is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). Information that is required to be submitted to the Government is confidential if its “disclosure would be likely either ‘(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.’” Critical Mass, 975 F.2d at 878 (quoting National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted).

1. Voluntary Submission

In your substantiation, you claimed that the information was submitted voluntarily to the Agency. Under EPA’s regulations at 40 C.F.R. § 2.201(i), voluntarily submitted information consists of business information the submission of which the EPA had no statutory or contractual authority to require, as well as business information the submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability. For a submission to be mandatory, a law must affirmatively require the submission of information or give the Agency authority to require the submission of information. Only actual legal authority – not the requester’s intent or the submitter’s belief – is to be considered in determining whether a submission is required or voluntary. Center for Auto Safety v. NHTSA, 244 F.3d 144, 149 (D.C. Cir. 2001). The Agency must not merely possess authority to require submission; it must also exercise its authority. The decision to exercise this authority is entirely within the discretion of the Agency. Critical Mass, 975 F.2d at 880; Parker v. Bureau of Land Management, 141 F. Supp. 2d 71, 78 n.6 (D.D.C. 2001).

In this case, the Agency did not exercise its authority to require the submission of the vendor information. Nor was the submission of the information a condition of obtaining some benefit or avoiding some disadvantage under an EPA regulatory program. Veolia voluntarily provided this information to the EPA in order to assist the Agency to assist the EPA in its rulemaking efforts. This information was not collected under the authority of Section 308 of the Clean Water Act (Federal Water Pollution Control Act, 33 U.S.C. § 1318), and because it was a

vendor and not a steam electric generation plant, Veolia was not required to respond to the *2010 Questionnaire for the Steam Electric Power Generating Effluent Guidelines*. Therefore, I conclude that the Veolia submitted the information to the EPA voluntarily.

2. Not Customarily Disclosed

Information that is voluntarily submitted to the EPA must be withheld under Exemption 4 of the FOIA if “it is of a kind that would customarily not be released to the public.” Critical Mass, 975 F.2d at 879. The Agency’s review must be objective and “must meet the burden of proving the provider’s custom.” Id. Courts have not articulated a clear standard for whether information has been customarily disclosed to the public, but they do offer guidance. Information that has been previously disclosed may nonetheless receive Exemption 4 protection as long as the submitter has not made the kind of information being claimed as CBI available to the general public. Center for Auto Safety, 244 F.3d at 151-53.

Veolia claims that the information is neither customarily disclosed nor available to the general public. The information includes Veolia’s installation and O&M costs derived from many years of Veolia’s experience in designing, supplying, installing, and operating its proprietary evaporation, crystallization, and ZLD systems. This information is only available to Veolia’s system designers. In sharing this information with the EPA, you have indicated that Veolia had clearly marked each document or designated specific information that should remain confidential. In addition, Veolia took all available steps to protect its claimed CBI, including requiring all customers with access to cost and operational information to be subject to Non-Disclosure Agreements (“NDA”) or to confidentiality provisions outlined in every bid proposal. Veolia further explained that its internal procedures require that confidential information are not to be shared with any third parties without written, enforceable obligations of confidentiality. In its analysis of this matter, the EPA has not found any reason to doubt these assertions by Veolia. Therefore, I find that the Veolia has not customarily disclosed the information.

Furthermore, because Veolia voluntarily provided these categories of information to the EPA to support its rulemaking effort to revise the effluent limitations guidelines and standards for the steam electric power generating industry, any disclosure would lessen, if not eliminate, the future availability of Veolia information in the future. Accordingly, release of this information would likely impair the Agency’s ability to receive Veolia’s sensitive information for future effluent guidelines rulemakings.

Conclusion

For the reasons outlined above, I find that the information is entitled to confidential treatment. Therefore, this information must be withheld under Exemption 4 of the FOIA. Should you have any questions concerning this matter, please call Quoc Nguyen at (202) 564-6343.

Sincerely,

A handwritten signature in black ink, appearing to read 'K Miller', with a long horizontal flourish extending to the right.

Kevin Miller
Assistant General Counsel
General Law Office

cc: Robert Wood, Director, Engineering & Analysis Division, Office of Water
Jan Matuszko, Environmental Engineer, Engineering & Analysis Division, Office of Water